Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 78-74

RALPH WAYNE THEIS,

APPELLANT

VERSUS

CITY OF SAN ANTONIO, ACTING BY AND THROUGH ITS WATER WORKS BOARD OF TRUSTEES OF SAN ANTONIO,

RESPONDENT

On Appeal From the Supreme Court of the State of Texas

JURISDICTIONAL STATEMENT

EDWARD V. DYLLA
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No.----------

RALPH WAYNE THEIS,
Appellant
VS.
CITY OF SAN ANTONIO, ACTING BY AND THROUGH ITS WATER WORKS BOARD OF TRUSTEES OF SAN ANTONIO,
Respondent

On Appeal From the Supreme Court of Texas

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Court of Civil Appeals for the twelfth Supreme Judicial District of Texas, Sitting at Tyler, Texas, is reported at *545 Sw 2d, 278* and is set forth in the Appendix infra pp. la-13-a.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to*28 U.S.C., Section 1257(2),* this being an appeal which draws into question the validity of Rule 301, Texas Rules of Civil Procedure, as applied by the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas to this particular set of facts, it being the contention of Appellant that such an application is invalid on federal grounds and is repugnent to the Constitution of the United States of America.

Appellant originally brought this cause of action against Appellee for wrongful suspension and/or discharge in cause No. 76-CI-678, in the 57 Judicial District Court of Bexar County, Texas. The trial on the merits commenced on March1, 1976, and the jjury returned its verdict in favor of Appellant and said verdict was received by the Court on March 4, 1976, susbstantially as follows: (1) that Respondent did not have probable cause to suspend Appellant on November 19, 1975; (2) that the amount of $62,500.00 should be awarded to Appellant as actual damages; (3) that the suspension of Apellant by Respondent was of such a nature as to constitute malice; and (4) that the sum of $87,500.00 should be awarded against Respondent and to Appellant as exemplary damages. Respondent filed a motion for judgment non obstante veredicto which was heard on March 30, 1976, and the Trial Court ordered that the answers of the jury to Special Issues Nos. 3 and 4, supra, be disregarded.

Judgment was rendered on the reformed verdict on April 2, 1976, awarding Appellant $62,500.00 in actual damages.

The Trial Court overruled the amended motion for new trial of Respondent and so entered its order on April 29, 1976.

Respondent processed its appeal to the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas, Sitting at Tyler, Texas, and on July 21, 1977, that Court handed down its judgment, reversing and rendering the verdict of the jury and the judgment of the Trial Court.

Appellant timely filed his motion for rehearing, which was overruled by that Court of Civil Appeals on August 18, 1977, and is set forth in the appendix, infra, p. 1b.

Appellant then timely filed his application for writ of error to the Supreme Court of the State of Texas, which application was refused, no reversible error, on February 8, 1978,

infra, p. 1c.

Appellant timely filed his motion for rehearing on application for writ of error with the Supreme Court of the State of Texas, which was duly considered and overruled on March 22, 1978, infra, p. 1d.

As the Supreme Court of the State of Texas explicitly rejected Appellant's challenge to the manner in which the Court of Civil Appeals applied Rule 301, Texas Rules of Civil Procedure, this matter is appropriately brought to this Court by appeal. *See e.g. Danhnke-Walker Milling Co. vs Bondurant, 257 U.S. 282; Bantam Books, Inc., vs Sullivan, 372 U.S. 58, 61, n. 3.*

Appellant raised the question of the constitutionality of the application of Rule 301, Texas Rules of Civil Procedure, directly for the first time on his motion for rehearing on application for writ of error and will show this Honorable Court herein that this was timely. The question was created by an unexpected decision of the Supreme Court of the State of Texas, giving Appellant no prior opportunity to anticipate or assert the particular question involved, and his motion for rehearing on application for writ of error constituted his first and only chance to present the question to that Court. The refusal of the Supreme Court of the State of Texas to grant his application for writ of error was a surprise to Appellant, as that Court had consistently held that nowhere is authority given to the Trial Court or to the Court of Civil Appeals in Texas in such cases to set aside the verdict of the jury and substitute its own findings instead of the findings of the jury and render judgment according to its own findings. For this reason, this matter is additionally appropriately brought to this Court by appeal. See e.g. *Herndon vs Georgia, 295 U.S. 441.*

In the event that the Court does not consider appeal the proper mode of review, Appellant requests that the papers

Whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to *28 U.S.C., Section 2103.*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States of America.

This case also involves Rule 301, Texas Rules of Civil Procedure, which states:

> "The Judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity. Provided, that upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any Special Issue Jury Finding that has no support in the evidence. Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law. Judgment may, in a proper case, be given for or against one or more of several plaintiffs, and for or against one or more of several defendants or intervenors."

QUESTION PRESENTED

Whether the construction and application given to Rule 301, Texas Rules of Civil Procedure, by the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas in reversing and rendering the verdict of the jury and the judgment of the Trial Court herein deprived Appellant of his

inviolate right of trial by jury and violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States of America?

STATEMENT

Prior to the original trial of this cause on its merits, Appellant, Ralph Wayne Theis, was employed by Respondent as supervisor of its construction - inspection division.

On November 19, 1975, Appellant was suspended from his position with Respondent without pay or any other benefits.

Respondent advised Appellant that he was being suspended without pay for a period not to exceed six (6) weeks in accordance with the provisions of V.D. 7.c. "theft of City Water Board or employee property or other forms of dishonesty" of the Personnel Manual of Respondent.

Appellant filed suit against Respondent for damages and injunctive relief on January 19, 1976, with a hearing for a temporary injunction set for January 27, 1976.

On Saturday, January 24, 1976, at 4 o'clock in the afternoon, Respondent's employees, Toler and Anderson, went to the home of Appellant and presented him with a letter, notifying him that he was being summarily discharged.

On Monday, January 26, 1976, Respondent filed a motion for continuance and a plea in abatement, and urged both motions prior to the hearing on January 27, 1976, and, no testimony having been presented by Respondent, the Judge of the District Courts of Bexar County, Texas, overruled both motions.

While the hearing for temporary injunction was still in progress, an agreement was reached between Respondent and

Appellant whereby Appellant would be reinstated as an employee, as if he had not been discharged; that he be continued on suspension; that he be paid all wages and other benefits accrued since November 19, 1975; that Respondent continue to pay Appellant all wages and other benefits as accrued through final disposition of said cause on its merits; that a writ of injunction issue in accordance with the order; and that the cause be specially set for trial in its merits for March1, 1976, at 9 o'clock A.M.

As previously set out, the trial on the merits did commence on March 1, 1976, and the jury returned its verdict in favor of Appellant and said verdict was received and filed by the Court on March 4, 1976, substantially as follows: (1) that Respondent did not have probable cause to suspend Appellant on November 19, 1975; (2) that the amount of $62,500.00 should be awarded to Appellant as actual damages; (3) that the suspension of Appellant by Respondent was of such a nature as to constitute malice; and, (4) that the sum of $87, 500.00 should be awarded against Respondent and to Appellant as exemplary damages. Respondent filed a motion for judgment non obstante veredicto which was heard on March 30, 1976, and the Trial Court ordered that the answers of the jury to Special Issues Nos. 3 and 4, supra, be disregarded. Judgment was rendered on the reformed verdict on April 2, 1976, awarding Appellant $62,500.00 in actual damages. The Trial Court overruled the amended motion for new trial of Respondent and so entered its order on April 29, 1976. Twelfth Supreme Judicial District of Texas, on appeal, on July 21, 1977, handed down its judgment, reversing and rendering the verdict of the jury and the judgment of the Trial Court. A motion for rehearing of Appellant was overruled by that Court of Civil Appeals on August 18, 1977. The Supreme Court of the State of Texas refused the application for writ of error of Appellant, no reversible error, on February 8, 1978. The Supreme Court of the State of Texas duly considered and overruled the motion for rehearing on application for writ of

error of Appellant on March 22, 1978.

Appellant gave notice of appeal to the Supreme Court of the United States of this cause to the Supreme Court of the State of Texas and to the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas. Sitting at Tyler, Texas, on June 14, 1978, infra, p. 1e.

1. Events prior to Appellant's suspension.

Appellant, Ralph Wayne Theis, was employed by Respondent in July, 1972, as a project engineer in charge of construction-production facilities. In April or May of 1973, he was promoted to supervisor of the construction-inspection division of Respondent.

Appellant came to Respondent after being employed by Dow Chemical Company since December, 1963. He had attended the University of Houston at night and received his Bachelor's degree in Mechanical Engineering while with Dow.

According to Hugh R. Anderson, the immediate supervisor of Appellant, Theis had an unblemished record while employed by Dow.

Anderson also testified that up to and including November 19, 1975, Theis had a spotless record with Respondent; and that in May, 1974, he recommended Appellant for a raise.

Appellant was promoted to his position over Gordon P. Bowman, a long-time employee of Respondent, and followed the procedures and precedent established by his predecessor in negotiating contract changes with outside contractors, for which Respondent always received full value, even though the nomenclature employed was not always correct. The evidence further showed that the action taken against Appellant on November 19, 1975, was precipitated by false, unsubstantiated and never proven accusations made against him by the

same Gordon P. Bowman to the effect that Appellant was in business with a utility contractor doing business with Respondent; that such a contractor had performed certain work at Theis' home; and that Theis was in a real estate partnership with such a contractor.

Not one shred of evidence was even attempted to be introduced to prove such false accusations.

Respondent admitted that it could find no substance to the charges originally made against Appellant by Gordon P. Bowman.

2. Events transpiring from November 19, 1975, to March 1, 1976.

On November 19, 1975, Appellant was suspended from his position with Respondent without pay or any other benefits.

Appellant was not informed of any charge or allegation being made against him and given no opportunity to respond to any charge or allegation being made against him prior to his suspension.

Respondent advised Appellant that he had apparently been involved in "irregularities" in records, charge orders and final payment certificates; that he was being suspended without pay for a period not to exceed six (6) weeks in accordance with the provisions of V.D. 7.c. "theft of City Water Board or employee property or other forms of dishonesty" of the Personnel Manual of Respondent.

Within four (4) days, Appellant prepared a written document setting out his findings, answers and explanations to the allegations made against him which he presented to his immediate supervisor, Hugh R. Anderson, on Nobember 26, 1975. Appellant received no reply from Respondent. Consequently, Appellant employed legal cousel to represent him.

On December 30, 1975, Respondent unilaterally extended the suspension of Appellant, "Without pay for a period not to exceed 15 days effective upon receipt of this letter...".

By letter dated January 15, 1976, Respondent advised Appellant that it was its determination that the audit report of Ernst & Ernst dated January 13, 1976, should be turned over to the appropriate law enforcement authorities at that time. He was further notified that "you are therefore continued on suspension without pay while the matter is reviewed by local law enforcement authorities".

Its suspension having been made indefinite and there being a possibility that he was to be criminally prosecuted, Appellant filed suit against Respondent for damages and injunctive relief on January 19, 1976, with a hearing for a temporary injunction set for January 27, 1976.

On Saturday, January 24, 1976, Respondent summarily discharged Appellant; the hearing was had on the temporary injunction on January 27, 1976, with the results heretofore set out; and the cause proceeded to a trial on its merits on March 1, 1976, in the 57th Judicial District Court of Bexar County, Texas.

3. Uncontroverted evidence adduced at the trial, without objection by Respondent.

A jury was duly selected and empaneled on March1, 1976, and the following evidence was presented by Appellant, was uncontroverted and not objected to by Respondent:

(a). Robert Van Dyke, General Manager of Respondent, alluded to an internal audit that showed there were certain "irregularities" in contracted jobs with Respondent, without being specific as to when he learned of the alleged "irregularities".

(b). The audit of contracted jobs was for a period of approximately eighteen (18) months and in the gross amount of approximately $6,000,000.00.

(c). The $6,000,000.00 in contracts were for approximately five hundred jobs.

(d). Of these five hundred jobs, Respondent arbitrarily selected twenty-two (22) jobs (restricted to Appellant) for audit, or only about 5% of the total jobs for this period.

(e). Of the $6,000,000.00 in contracts, only $36,000.00 were in question as to Appellant, amounting to only one-half of 1% of the entire amount of the contracts.

(f). Appellant did not approve any of the certificates in question for payment.

(g). Appellant did not sign any of the change orders in question.

(h). Appellant was not the inspector for the Respondent on any of the jobs in question.

(i). To the contrary, Hugh R. Anderson, Appellant's immediate supervisor, approved all of the certificates in question for payment. (Curiously, no charge was brought against Anderson and he continues in the employ of Respondent without reprimand to this day).

(j). The contract changes which were negotiated by Appellant were done in accordance with the precedent established by his predecessor, Gordon P. Bowman, for which Respondent always received full value, even though the nomenclature employed was not always correct.

(k). As in the case of Hugh R. Anderson, Gordon P.

Bownam had no charges brought against him, and continues in the employ of Respondent to this day, without reprimand.

(l). That Respondent breached its contract of employment with Appellant by failing to comply with its own grievance procedures, irrespective of Appellant's suspension.

(m). That Respondent made false representations to Appellant by three separate letters as to time limits to be set for a decision in his case, upon which Respondent had every right to rely.

(n). That Respondent made false statements and representations to Appellant that the results of an "investigation" would be turned over to law enforcement authorities.

(o). That Respondent made false and deceptive representations to Appellant that an "investigation" would be completed, after which certain steps would be taken, when in fact no "investigation" has ever been completed or was intended to be.

(p). That no evidence was ever adduced by Respondent that actual shortages and/or over-payments actually existed, other than on paper, or that Respondent did not receive value for each dollar expended to outside contractors.

This was given emphasis by the fact that Respondent has never attempted to recover nor alleged that it was due recovery of any monies from any outside contractors during the eighteen month period; and the fact that Respondent has never asked the contractor involved in the installation of fire hydrants to install the fire hydrants, which had to be ordered, and which were not even available for installation at the suspension of Appellant.

(q). The admission of Hugh R. Anderson that he was the person actually responsible for approving the contracts for

payment and that he only visited the job every month or so.

(r). The admission of Hugh R. Anderson that he had to depend on his subordinates in approving certain items, and that Appellant also had to depend on his subordinates in kind.

(s). That a large number of jobs by outside contractors legitimately required contractual changes, which had to be negotiated, and of which Respondent was fully aware.

(t). That no act of theft of City Water Board property or employee property or other form of dishonesty on the part or Appellant was ever placed in evidence by Respondent.

(u). That Appellant did not and has not admitted any theft of City Water Board property or employee property or other form of dishonesty that could reasonably have been contemplated to be encompassed within the phrasing of the stringent language of the section made the basis for his suspension.

4. Procedures in the Trial Court.

From the initiation of the proceedings on March 1, 1976, after the empaneling of the jury, and prior to the submission of the Trial Court's main charge to the jury on March 4, 1976, it must be noted that:

(a). There was no exception taken to any pleading by Respondent alleging any "judicial admission" prior to trial or prior to the returning of its verdict by the jury and its receipt by the Court.

(b). Respondent filed prior to its verdict its plea in abatement without raising any issue, directly or indirectly, as to any "Judicial admission" on the part of Appellant.

(c). No objections were made to any testimony favorable

to Appellant by Respondent thoughout the trial.

(d). Testimony was received in evidence by the Court favorable to Appellant, without objections on the part of Respondent, after the alleged "judicial admissions" by Appellant.

(e). Respondent at no time prior to the submission of the Court's main charge to the jury invoked the doctrine of judicial admissions nor made any allusion thereto the Trial Court.

(f). Respondent made no motion for an instructed verdict on any grounds.

(g). Respondent did not object nor except to the charge of the Court to the jury (or any part or special issue contained therein, including Special Issue No. 1), on the grounds that there was no evidence having probative force on which the jury could make the finding in favor of Special Issue No. 1.

(h). Respondent did not raise by its pleadings (which it was authorized to do by trial amendment) the affirmative defenses required by Rule 94 of the Texas Rules of Civil Procedure as to waiver, estoppel, fraud, illegality, or any other matter constituting an avoidance or affirmative defense, in the face of the purported "judicial admissions".

(i). No evidence was presented by Respondent that Appellant had allegedly violated any statute and/or penal code of the State of Texas nor was the Trial Court asked to take judicial notice of same prior to verdict.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

On its appeal to the Court of Civil Appeals, Respondent assigned twenty-one (21) points of error for consideration by

that Court.

The Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas reversed and rendered this cause on only one point of error; i.e., Point of Error No. 12 of Respondent. It found the other points of error to be without merit.

Point of Error No. 12 of Respondent before that Court reads as follows:

> "The Trial Court erred in overruling the Defendant's first supplemental motion for judgment notwithstanding the verdict because the uncontradicted evidence and Appellee's judicial admission showed as a matter of law that the Defendant had probable cause to suspend the Plaintiff. (Defendant's First Supplemental Motion for Judgement Non Obstante Veredicto, Par. XII., Tr. 122)."

The Court of Civil Appeals then attempted to use Rule 301, Texas Rules of Civil Procedure, as the vehicle for conclusively determining the facts of the case; setting aside the verdict of the jury; substituting its own findings instead of the findings of the jury; and rendering judgment according to its own findings, in deprivation of the inviolate right of a trial by jury guaranteed by the Constitution of the State of Texas, Article 1, Section 15, and the Fourteenth Amendment to the Constitution of the United States of America.

It is the contention of Appellant that the application made to Rule 301, Texas Rules of Civil Procedure, to the facts of this case is invalid, and this appeal is not to be construed as a contention that Rule 301 is being challenged in its entirety.

It is apparent upon the face of the record that the Court of Civil Appeals held that the Trial Court abused its discretion and committed error by not directing a verdict for Respondent

on the Trial Court's own motion, although the alleged "judicial admissions" were not called to the attention of the Trial Court in any manner prior to the return of the verdict by the jury; and although there has never been any contention by either the Respondent or the Court of Civil Appeals that the Trial Court abused its discretion.

THE FEDERAL QUESTION IS SUBSTANTIAL

The construction given to Rule 301, Texas Rules of Civil Procedure, by the Court of Civil Appeals for the Twelfth Supreme Judicial District, Sitting at Tyler, Texas, deprived Appellant of his inviolate right of a trial by jury guaranteed by the Constitution of the State of Texas, Article 1, Section 15, and the Fourteenth Amendment to the Constitution of the United States of America, as that Court had no authority to conclusively determine the facts of this case; set aside the verdict of the jury and substitute its own findings instead of the findings of the jury; and render judgment according to its own findings, as set out by Appellant in Point One of its Assignment of Error in his motion for rehearing on application for writ of error to the Supreme Court of the State of Texas, which was duly considered and overruled on March 22, 1978.

The Court of Civil Appeals has, in substituting its judgment for that of the jury and the Trial Court, does raise serious questions under both Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States of America.

I.

The Court of Civil Appeals had no authority to conclusively determine the facts of this case; set aside the verdict of the jury and substitute its own findings instead of findings of the jury; and render judgment according to its own findings, as such a construction of Rule 301, Texas Rules of Civil Procedure, deprives Appellant of his inviolate right of a trial by jury

guaranteed by the Constitution of the State of Texas, Article 1, Section 15, and the Fourteenth Amendment to the Constitution of the United States of America.

It is apparent upon the face of the record that the Court of Civil Appeals held that the Trial Court abused its discretion and committed error by not directing a verdict for Respondent on the Trial Court's own motion, although the alleged "judicial admissions" were not called to the attention of the Trial Court in any manner prior to the return of the verdict by the jury; and although there has never been any contention by either the Respondent or the Court of Civil Appeals that the Trial Court abused its discretion.

The Court of Civil Appeals cited no cases dealing with whether or not "a directed verdict would have been proper" under Rule 301, when the Appellant failed to invoke the doctrine of "judicial admissions" prior to verdict and there was, absent any ruling theron, evidence upon which a jury could return a verdict for the adverse party.

The Statement of Facts in this cause is replete with facts upon which the jury could return the answer to Special Issue No. 1 which it did, infra.

The Court of Civil Appeals did not consider any facts favorable to Appellant nor to the answer that the jury returned to Special Issue No. 1.

It must necessarily follow that there could have been some evidence having probative force on which the jury could have made the findings they did to Special Issue No. 1.

Petitioner has not found a single authority of any kind which would support the ruling of the Court of Civil Appeals on this point.

There are no rules of procedure, statutes or cases requiring a Trial Judge to take judicial notice that mere testimony in a case might give rise to the application of an evidentiary doctrine such as "judicial admissions" when not invoked by the party who might otherwise be entitled thereto.

It necessarily follows that the Court of Civil Appeals cannot invoke the doctrine of "judicial admissions" for Respondent after verdict when there was no error by the Trial Court in not doing so, having not been requested to do so by Respondent.

All of the cases found by Appellant in regard to Rule 301 involved proper predicate being laid in the Trial Court by the complaining party prior to verdict.

Perhaps one might ask if the Court of Civil Appeals is not holding that the Trial Court abused its discretion in not taking judicial notice of any alleged "judicial admissions" and, on its own motion, directing the verdict for Respondent?

First of all, the Court of Civil Appeals does not even deal with the question of abuse of discretion by the Trial Court in its opinion.

Secondly, Respondent has nowhere alleged that the Trial Court abused its discretion in not taking such action.

Thirdly, it has been universally held that the Trial Court has wide discretion in passing upon the admissibility of evidence. See *Bell vs Buddie's Super-Market, 516 SW 2d 447, ref. n.r.e.; Thompson vs Janes, 245 SW 2d, 718, aff. 251 SW 2d 953, 151 Tex. 495; Whatley vs McKanna, 207 SW 2d 645, ref. n.r.e.*

Fourth, that the burden of proving that the Trial Court abused its discretion is on the one attacking that Court's action

has been stated by the Supreme Court of the State of Texas in *Lutheran Social Service, Inc., vs Meyers, 460 SW 2d 887,* as well as in *Marshall vs Goodtimes, Inc., 537 SW 2d 536, error dismissed.*

The Supreme Court of Texas, in the case of *Robert Landry, Jr., vs The Travelers insurance Company, 458 SW 2d 649,* stated that where the question for decision on appeal is whether there was an abuse of the Trial Court's discretion, the Appellate Court is not to substitute its judgment for that of the Trial Court but rather must decide whether the Trial Court's decision was arbitrary or unreasonable.

In the case of *Ruth Leggett Jones, et al vs J.R. Strayhorn, 321 SW 2d 290,* another decision of the Supreme Court of the State of Texas, it is set out that:

> "The mere fact or circumstance that a trial judge may decide a matter within his discretionary authority in a manner different from what an appellate judge would decide if placed in a similar circumstances, does not demonstrate that an abuse of discretion has occurred".

See also *33 Texas Jurisprudence Second, Section 75; Joseph A. Canavespe vs Cynthia Joy Havins, 478 SW 2d 166; Texas Compensation Insurance Company vs James Lee Matthews, 510 SW 2d 640; Traders and General Insurance Company vs Heath, 197 SW 2d 130; Waters vs Bruner, 355 SW 2d 230; Mary Elliott vs Judge George Hamilton, 512 SW 2d 824; Karnes vs Cunningham, 350 SW 2d 59.*

This holding of the Court of Civil Appeals files in the face of old and well established law in the State of Texas.

In the case of *Choate vs San Antonio and A.P. Ry. Co., 44SW 69, 91 Tex. 406,* we find the following language:

> "Nor do we concur in the opinion that the Court of Civil Appeals have the right to conclusively determine the facts of any case. Our Bill of Rights contains emphatic declaration that 'the right of trial by jury shall remain inviolate.'.... 'It (the Court of Civil Appeals) had no power to make an original final determination of a question of fact.' .... 'It is contrary to the genius of our institutions, as well as to the letter and spirit of every Constitution ever adopted in this state, to suppose that it was ever intended to substitute the judgment of the Appellate Courts upon the facts of a case in place of that of the jury, and to make the determination of these courts final.' "

This same, emphatic language appears in the case of *Brown et al vs City Service Company, 245 SW 656,* in a Commission of Appeals case adopted by the Supreme Court of the State of Texas:

> "The jury had the right and the duty of passing on the weight of the evidence. " ...."Nowhere is authority given to the trial court or to the Court of Civil Appeals in such cases to set aside the verdict of the jury and substitute its own findings instead of the findings of the jury and render judgment according to its own findings."

In the Supreme Court cases of *Ramsey vs Dunlop, 205 SW 2d, 979,* restated in *W.G. McCauley vs Consolidated Underwriters, 305 SW 2d, 265,* it has been held that an error which directly and adversely affects the interest of the public generally, as that interest is declared in the statutes or Constitution of this state, is a fundamental error.

Appellant respectfully submits that fundamental error had been committed by the Court of Civil Appeals for the Twelfth Judicial District of Texas in light of the foregoing authorities

for the reasons that the Trial Court committed no error, Appellant committed no error and the only error on the face of the record is that of Respondent in its failure to properly preserve error, if any, in the Trial Court; and that Appellant has been denied his Constitutional right of trial by jury.

II.

The question of the constitutionality of the application of Rule 301, T.R.C.P, was timely raised.

Appellant has previously cited to this Honorable Court the cases of *Choate vs San Antonio and A.P. Ry. Co.*, and *Brown vs City Service Company*, supra, and a long list of other authorities holding that no authority is given to the Trial Court or to the Court of Civil Appeals in Texas in such cases to set aside the verdict of the jury and substitute its own findings instead of the findings of the jury and render judgment according to its own findings.

The error of the Court of Civil Appeals appeared so obvious to Appellant that the unexpected decision of the Supreme Court of the State of Texas who refused to grant his application for writ of error came as a complete surprise to Appellant, in the face of such well established precedents to the contrary by the Supreme Court of the State of Texas. Had there been past decisions being applied by the Supreme Court of the State of Texas to the contrary, the result would have thereby been foreshadowed and the Appellant would have been bound to anticipate the probability of the result.

Such was simply not the case herein.

Appellant has also cited to this Honorable Court the cases of *Ramsey vs Dunlap and W.G. McCauley vs Consolidated Underwriters, supra*, where it has been held and is still the law in Texas that an error which directly and adversely affects the

interest of the public generally, as that interest is declared in the statutes of Constitution of this State, is fundamental error.

Both of these cases set out the principle that a fundamental error can be raised for the first time on appeal, although not preserved below, even by the Court on its own motion, when such an error directly and adverely affects the interest of the public generally, as that interest is declared in the statutes or Constitution of the State of Texas.

Surely, the deprivation of the inviolate right of a trial by jury is such an error as would directly and adversely affect the interest of the public generally, as that interest is declared in the statutes and the Constitution of the State of Texas and the Constitution of the United States of America.

III.

As this Court well knows, the Texas Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure and all ambiguities of the Texas Rules are to be construed in the light of the Federal Rules.

It is noted that Rule 50(b) of the Federal Rules of Civil Procedure requires the motion for instructed verdict as a prerequisite for a judgment non obstante veredicto.

There is no such requirement contained within Rule 301, Texas Rules of Civil Procedure, and this clearly opens a loop hole in trial procedure and affords an opportunity for ambush.

"Trial by ambush" has been fought against by the Courts of the United States and the proponents of the rules for years.

Appellant respectfully submits that the conflict between the Texas Rules and the Federal Rules of Civil Procedure is important enough to warrant early resolution and that the cause

brought before this Honorable Court is an immediate opportunity for such a resolution. See *6 Southwestern Law Journal 244*, a discussion by the Honorable Robert A. (Dean) Carlton, Jr., of Rule 301, T.R.C.P.

CONCLUSION

For the foregoing reasons probable jurisdiction should be noted.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

As shown by the separately filed Certificate of Service, which lists the persons served with copies of this jurisdictional statement and its appendix, service has been made upon all parties of record.

James G. Murry

COUNSEL FOR APPELLANT

COURT OF CIVIL APPEALS
TWELFTH SUPREME JUDICIAL DISTRICT OF TEXAS
Tyler, Texas July 21, 1977

Received July 25, 1977, Law Offices of James G. Murry

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Mr. James M. Parker
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Gentleman:

You are hereby notified that, in the case of CITY OF SAN ANTONIO, ACTING BY AND THROUGH ITS WATER-WORKS BOARD OF TRUSTEES VS. RALPH WAYNE THEIS our No. 1007, from Bexar County, the following decision and order was this day made and entered by this Court:
The Judgment of the trial court is reversed, and judgment is rendered that appellee take nothing. Copies of this court's judgment and opinion are enclosed herewith.

Respectfully yours,

Barbara G Holman, Clerk
Court of Civil Appeals for the Twelfth
Supreme Judicial District of Texas
By————————————, Deputy

JULY 21, 1977

JUDGMENT

1007 CITY OF SAN ANTONIO, ACTYING BY AND THROUGH ITS WATERWORKS BOARD OF TRUSTEES VS. RALPH WAYNE THEIS-- Appeal from 57th Judicial District Court of Bexar County

THIS CAUSE having been transferred to this Court from the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas by Order of the Supreme Court and said cause coming on to be heard on the transcript of the record; and the same being inspected, it is the opinion of the court that there was error in the judgment as entered by the trial court and that the same should be reversed and judgment rendered

It is therefore ORDERED, ADJUDGED and DECREED by the Court that the judgment of the trial court in favor of Ralph Wayne Theis, Appellee, be and the same is hereby reversed and judgment is here rendered that Appellee, Ralph Wayne Theis, take nothing; that the permanent injunction granted in favor of the appellee, Ralph Wayne is hereby rescinded; and that all costs in this behalf expended, both in this court and the court below be, and the same are, adjudged against the appellee, Ralph Wayne Theis, for which let execution issue and that this decision be certified to the court below for observance.

NO. 1007

IN THE COURT OF CIVIL APPEALS
TWELFTH SUPREME JUDICIAL DISTRICT OF TEXAS
TYLER TEXAS

CITY OF SAN ANTONIO, ACTING BY AND THROUGH ITS WATER WORKS BOARD OF TRUSTEES OF SAN ANTONIO, APPELLANT
VS.
RALPH WAYNE THEIS, APPELLEE

APPEAL FROM THE 57 th JUDICIAL DISTRICT COURT OF BEXAR COUNTY, TEXAS

This is a suit involving wrongful suspension of employment. Appellee Ralph Wayne Theis, plaintiff below (hereafter called "Theis"), filed suit against the appellant City of San Antonio, acting by and through its Water Works Board of Trustees (hereafter called "appellant"), seeking damages for wrongful suspension and temporary and permanent injuntive relief in the form of a full reinstatement to his former position and salary. At a hearing on the temporary injunction, pursuant to agreement between the parties, the court entered its temporary injunction ordering appellant to pay Theis's salary while he continued under suspension. Thereafter appellant filed its original answer alleging misconduct and incompetency on Theis's part in the pursuit of his job responsibilities, said misconduct chiefly consisting of unsubstantiated payments and overpayments to contractors doing construction work for appellant's water board.

Trial was before a jury who, in answer to special issues, found that appellant did not have probable cause to suspend Theis without pay (in answer to Special Issue No. 1); that as

a result of the wrongful suspension Theis suffered actual damages of $62,500.00 (in answer to Special Issue No. 2); that appellant acted with malice in suspending Theis (in answer to Special Issue No. 3); and that exemplary damages of $87,500.00 should be awarded against appellant (Special Issue No. 4). Defendant thereafter filed its motion for judgment n.o.v. The trial court partially granted said motion, and in its judgment recited that there was no evidence to support the jury's findings of malice and exemplary damages and that the jury's answers to Special Issues Nos. 3 and 4 should be disregarded. Otherwise, the court entered its judgment in favor of Theis and against appellant upon the jury's answers to Special Issues Nos. 1 and 2 in the amount of $62,500.00 with interest and costs in favor of Theis. The court's judgment also permanently enjoined appellant from doing any act or engaging in any conduct designed or intended to prevent Theis from pursuing his position with appellant.

After appellant made its motion and amended motion for new trial and the court's overruling of same, appellant timely perfected this appeal, alleging twenty-one points of error. Theis presents counterpoints in reply to appellant's points of error, and also presents two cross points complaining of the court's action in disregarding the jury's answers to Special Issues Nos. 3 and 4.

We reverse and render.

Theis's position was supervisor of the construction inspection division of the Water Works Board of San Antonio, a public utility owned by the City of San Antonio, appellant. The Water Board annually contracts out millions of dollars worth of construction work pursuant to public bidding. The construction work is done under the general conditions and specifications of Water Board contracts which Theis and Contractors were to follow. The general conditions permit extra work to be done in certain situations pursuant to the execu-

tion of change orders. Theis was responsible for negotiating change orders, and initiating payment for extra work done pursuant to authorized change orders. Theis's job included confirming that all work was performed and the materials furnished according to Water Board specifications prior to approving the partial payment or final payment certificates.

Theis held his position of supervisor from April 1973 until November 1975. During a period of approximately eighteen months, Theis approved payments to certain contractors which his superiors soon thereafter contended were unauthorized. Because of the amount of these alleged overpayments indicated by the Water Board's internal audit, the Water - Board's management commenced an investigation for possible dishonesty in connection with these overpayments.

On Nobember 19, 1975, Theis was handed a letter by Hugh R. Anderson, director of the engineering department, in which Theis was given notice of his suspension without pay "for a period not to exceed six weeks in accordance with the provisions of Section V.D.7.c., 'Theft of City Water Board or Employee Property or other Forms of Dishonesty' and Section V.E.1.e. (3), 'Disciplinary Layoff or Suspension Without Pay' of the City Water Board Personnel Manual." The letter informed Theis that a preliminary investigation indicated that "in respective cases overpayments, falsification, or alterations of change orders and final payment certificates" had been made in jobs individually listed by number in the letter. During the suspension effected by the letter an investigation was to be made in continuance of the preliminary investigation which preceded the suspension.

After the suspension, the Water Board ordered a full scale investigation by Ernst & Ernst, an auditing firm which conducted an independent audit. The audit was completed on January 13, 1976.

On Nobember 26, 1975, Theis delivered to Anderson an "Inter Office Memorandum" which set out Theis's answers and explanations to each of the jobs put in issue by the November 19th letter. Theis received no reply to this memorandum from appellant. In the meantime, Theis retained counsel who, on December 4, 1975, requested the Water Board in writing to send in detail the complete charges concerning the Water Board's accusations of dishonesty against Theis. On December 11, 1975, Anderson, in behalf of appellant, answered counsel's letter stating that Theis had not yet been charged with theft. Anderson also gave counsel specific information concerning the accusations stemming from the jobs in question, and notified counsel that Theis's alleged acts were in violation of state statutes.

By letter dated December 30, 1975, appellant advised Theis that his suspension without pay was being extended for an additional period not to exceed fifteen days pending further and thorough investigation of the allegations.

On January 15, 1976, Anderson, in behalf of appellant, notified Theis by letter that the audit report of Ernst & Ernst was being turned over to the appropriate law enforcement authorities at that time, and thereby continued the suspension without pay indefinitely while the matter was reviewed by local law enforcement authorities. The letter also notified Theis that his right to file a formal employee grievance was available to him.

On January 19, 1976, Theis filed this suit for damages and injunctive relief, with a hearing for temporary injunction set for January 24, 1976.

On Saturday, January 24, 1976, at 4:00 O'clock P.M., appellant's employees, Toler and Anderson, went to Theis's home and presented him with a letter, notifying him that he was being discharged. The letter covered in detail the grounds for discharge.

At the hearing on the temporary injunction, an agreement was reached between the parties that Theis would be reinstated as an employee as if he had not been discharged; that he be continued on suspension; that he be paid all wages and other benefits accrued since November 19, 1975; that appellant continue to pay Theis all wages and other benefits as accrued Through final disposition of said cause on its merits; that a writ of injunction issue in accordance with the order; and that the case be specially set for trial on the merits for March1, 1976.

Appellant in its points of errors nos. 1-8 complains of the permanent injunction granted by the court. Theis states under his counterpoint one in reply to appellant's points of error nos. 1-8 " that he wishes to and does now abandon his plea for permanent injunction and the relief granted him thereon by the Trial Court; that . . . this Court should order the Trial Court to reform its judgment to conform with the submission herein of Appellee." In compliance with this waiver the judgment of the trial court is reformed and the permanent injunction granted by the trial court in favor of appellee is hereby rescinded.

Appellant in its point of error no. 12 alleges that "The trial court erred in overruling the defendant's [appellant] first supplemental motion for judgment notwithstanding the verdict because the uncontradicted evidence and appellee's judicial admission showed as a matter of law that defendant had probable cause to suspend the plaintiff. (Defendant's First Supplemental Motion for Judgment Non Obstante Veredicto, Par. XII. Tr. 122)."

Theis's counterpoint five in reply to appellant's point of error contends that "Appellant is precluded from raising as error this point as it was not assigned as error in Appellant's first supplemental motion for new trial; nor did Appellant object and except to the submission of this issue prior to the submission of the Court's charge to the jury."

Tex.R.Civ.P. Rule 301 provides that". . . upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any Special Issue Jury Finding that has no support in the evidence." There is no prerequisite to appellate review that the grounds presented in a rule 302 motion must be repeated as assignment of error in a motion for new trial. Wagner v. Foster, 161 Tex. 333, 341 S.W.2d 887, 890 (1960); Tex.R.Civ.P. 324;

There is additionally no requirement that appellant object and except to the submission of a special issue on a "no evidence" basis as a predicate to attacking the same in a motion for judgment non obstante veredicto. 4 McDonald "Texas Civil Practice" Sec. 17.32, at pages 208-209.

The record is clear that appellee falsified certain payments to contractors in the form of payment certificates and work entries. Appellee himself judicially admitted doing so in the following testimony concerning a particular job done by the R.L. Jones Company under contract involving work done at a street intersection:

"Q. When the contractor reached that intersection, there was a disagreement about whether he was going to bore under the street, and he asked to be compensated extra for putting tunnel liners in; is that right?

"A. Yes, sir.

"Q. And you agreed that he could put in tunnel liners which weren't provided for in the specs, and you negotiated a price with him to put them in, right?

"A. Yes, sir.

"A. Yes, the negotiated price was $57.00 a linear foot.

"Q. Now, when it came time to prepare – – so, the change order was prepared by you that he would be paid extra for this, right?

"A. Yes, sir.

"Q. It was your judgment, then that he was not to follow the specifications, but to put in tunnel liners?

"A. YES, SIR, THIS WAS AN EXCEPTION.

"Q. Now, when it came time to pay the contractor, the amount of $57.00 a foot didn't appear on the payment certificate, did it?

"A. No, sir.

"Q. You prepared the payment certificate and approved it for payment, showing a different figure to be paid to the contractor; isn't that correct?

"A. Yes, sir.

"Q. Didn't you, in fact, show $27.00 a foot?

"A. Yes, sir.

"Q. In doing that, you showed an entry for something called select back-fill or sand for another $20.00 which was never actually delivered to the job; is that right?

"A. Yes, sir. That was a part of the payment for the tunnel liner.

"Q. You showed $37.00 a foot instead of $57.00 a foot, *and you showed an extra $20.00 a foot on something else* that was never delivered; is that right?

"A. Yes, sir.

"Q. In fact, the specifications didn't call for any sand or back - fill to be paid for as extra, did it?

"A. No, sir.

"Q. And there wasn't, in fact, any sand or back - fill delivered to that job, was there?

"A. No, sir.

"Q. And yet, you prepared a certificate which paid the contractor for a certain quantity of select back - fill and sand?

"A. Yes, sir."

In another job requiring installation of fire hydrants by the R.L.Jones Company, the testimony is as follows:

"Q. . . . This was a job in which the contractor was to install thirteen fire hydrants; is that correct?

"A. Yes, sir.

"Q. And he was paid for installing thirteen fire hydrants?

"A. Yes, sir.

"Q. And isn't it correct that there was an extra payment of $660.00 for fire hydrants that were not delivered – – that were not installed, and an additional $1,800.00 for the

taps for those fire hydrants that were not installed?

"A. Yes, sir.

"Q. And you approved the payment certificate for the payment of the thirteen fire hydrants, right?

"A. Yes, sir.

"Q. How many were actually installed?

"A. There were ten installed on the job.

. . .

"Q. Wasn't the contractor paid for the installation of thirteen?

"A. Yes, sir.

"Q. Mr. Theis, how can you be paid for fire hydrants that aren't installed and aren't there?

"A. There was a delay in getting the last three fire hydrants for the particular job, because they were specially ordered; and, evidently, they hadn't arrived by the time that the final payment certificate was issued on the job.

"Q. By the time that you issued the payment certificate, did you check to see if all thirteen had been installed?

"A. No, sir, I didn't go out and visually check all the jobs.

"Q. Did you check the plans to see if the inspectors had shown that the fire hydrants had been installed?

"A. No, sir.

"Q. To this date, have those five hydrants been installed?

"A. I don't know if they have or not.

. . .

"A. . . . immediately after my suspension, I drove by the job and there were three fire hydrants missing on it."

Another job done under appellee's supervision involved the execution of change orders for extra work. The testimony concerning it is as follows:

"Q. So, when this $13,650 worth of extra work was agreed upon in this Cody Street job, it was up to you and the people under your supervision to see that it was done before it was paid for; right?

"A. Yes, sir.

"Q. Well, sir, are you able to say, under oath, that that work was done before it was paid for?

"A. No, sir.

"Q. Yet, you signed a payment certificate in each of these instances that total $13,650 approving payment for that work?

"A. Yes, sir, based on the assumption that the payment certificate was correct and the work had been done.

"Q. Yet, there are no indications on the as – built plans that this work was actually done, are there?

"A. No, sir.

"Q. Did you check the as - built plans before you paid the contractor?

"A. No, sir.

"A. No, I didn't check all the jobs - - or I didn't check a lot of the jobs against the as - built plans.

"Q. Isn't it a fact, Mr. Theis, that at least seven of these intersections, that no wet connections were actually installed and no what's called tapping sleeves were installed, which were provided for in the contract?

"A. Yes, sir.

"Q. And the contractor had already been paid for that in the original contract, right?

"A. Yes, sir, for that work.

"Q. All right, sir. And yet, he was paid for wet connections on top of that, that was never done?

"A. Yes, sir. I said that I relied upon the payment certificates filled out by the payment estimator and the inspector.

. . .

"Q. Have you ever caught this clerical person in any mistakes?

"A. Yes, sir, on occasion.

"Q. Did you check him out on this particular computation to see if there were any mistakes made?

"A. No, sir,"

The above testimony constitutes a judicial admission by appellee that he committed certain acts which constitute falsifications of government records or job - related misconduct. "A judicial admission consists of a formal statement, either by a party or his attorney, in the course of a judicial proceeding which removes an admitted fact from the field of controversy." Mobil Oil Co. v. Dodd, 515 S.W, 2d 351, 353 (Tex.Civ. App - Corpus Christi 1974, no writ). See Gevinson v. Manhattan Constr. Co., 449 S.W. 2d 458, 466 (Tex. Sup. 1969). If these acts which appellee judicially admitted constitute a serious violation of his employment contract, they would extinguish appellee's right to recover for wrongful suspension, if suspension was warranted by the doing of these acts.

Our determination of this case therefore hinges upon the question of whether as a matter of law appellant had probable cause to suspend plaintiff. In doing so we must review the job duties and responsibilities of appellee in light of the conditions contained in the City Water Board employee handbook.

The formal job description of appellee's position, Supervisor of the Construction Inspection division, involved the following typical duties:

"1. Supervises the personnel and activities of a group representing the City Water Board on Construction contracts . . . to assure conformance to contract specifications.

"2. Coordinates construction projects with contractor . . . by conducting . . . detailed inspections to . . . record existing irregularities . . .

"3. Approves certificates for partial and final payments to contractor.

"4. Negotiates contract change orders resulting from field changes made to original plans and establishes costs associates with these changes. . . .

"6. Visits construction projects and confers with construction inspectors on matters such as progress of job according to schedule, field changes made and required, . . . and the like.

"7. Inspects in conjunction with Construction Inspector-Senior completed projects for discrepancies and insures any discrepancies found are corrected prior to initiating final payment.

"10. Maintains or directs the maintenance of various maps and records such as . . . records of contract work, payment record, inspector estimates, and the like.

"11. Performs related duties as required."

A City Water Board Handbook entitled "Employee Handbook on Employee Grievance and Discipline-Discharge For Cause" sets out generally recommended disciplinary steps. Under the "Discipline-Discharge For Cause" provisions, the following provisions appear:

"C. Justifiable Cause for Employee Discipline or Discharge:

6. Willful violation of City Water Board Rules.

8. Various acts of dishonesty or misconduct including . . . falsifying of work records . . .

10. Incompetence towards the work situation which would include carelessness, defective work . . .

"D. Discipline and Discharge Standards and Practices:

1. The type of disciplinary action taken will be related to the circumstances surrounding the actions or omissions of the employee . . . .

2. In cases of serious offenses such as stealing of City Water Board properties . . . a supervisor is *not* required to follow a progressive series of disciplinary actions . . . .

. . .

7. The form of discipline used will depend upon the circumstances surrounding the situation . . . . [G] eneral quidelines . . . are provided as guides and are not intended to restrict the actions of supervisors nor to define the disciplinary measures to be taken in any specifie instance.

c. THEFT OF CITY WATER BOARD OR EMPLOYEE PROPERTY OR OTHER FORMS OF DISHONESTY – – These offenses normally result in an immediate suspension in order for an investigation to be made. Depending on the results of the investigation the employee may be discharged, continued on suspension while the matter is turned over to local law enforcement authorities or returned to duty . . . . "

The tenor of the above rules in our opinion is that in situations where serious violations appear to have occurred, a supervisor is not required to follow a progressive series of disciplinary actions. The record shows that concerning jobs under appellee's supervision a total amount of $36,479.00 was paid for goods

and services which were either not received or that some other goods and services were received and paid for in violation of City Water Board and job contract rules. The record also shows $93,482.00 was paid for goods and services which were received but the reason for payments to contractors for specific items are questionable. The expense for some of the items were to have been paid by the contractors as required by City Water Board and job contract rules. The fact that such large expenditures were in question gives us little doubt that a full and proper investigation was required. The provisions of City Water Board's "Employee Handbook on Employee Grievance and Discipline Discharge For Cause" we think allowed appellee's supervisors in this situation the right to suspend appellee while an investigation was made.

As shown earlier in the description of appellee's job, he was in a supervisory role, and either had control over or maintained or directed "the maintenance of various maps and records such as . . . records of contract work, payment records, inspector estimates, and the like." An investigation into the subject irregularities required a detailed analysis of records under appelle's control The amount of money in question necessitated an investigation that could only be properly conducted in appellee's absence from the job to assure preservation of the records.

Appellee contends that the section of the handbook under which he was suspended required a dishonest act. An investigation here was needed to determine if appellee's acts were dishonest or incompetent or both. We think the purview of the section allegedly requiring a dishonest act covers such a situation as this one. Appellee himself admitted falsifying a governmental record which in itself is a violation of Tex. Penal Code Ann. sec. 37.10 (1974).

The record is clear that certain overpayments were undisputedly made and that other serious irregularities existed. This, plus appellee's judicial admissions, we think, establish

as a matter of law that appellee's superiors had probable cause to suspend appellee pending investigation. Where certain facts are undisputed, the trial court may disregard the jury's findings to a special issue and render judgment on the undisputed evidence. Wooley v. West, 391 S.W. 2d 157 (Tex.Civ.App. - Tyler 1965, writ ref'd., n.r.e.); Tex.R.Civ.P. 301.

We have considered appellant's remaining points of error and find them to be without merit. They are accordingly overruled.

Appellee presents two cross points of error alleging that the court erred in disregarding the jury's findings that appellee was entitled to recover exemplary damages in the amount of $87,500.00. In light of our holding that as a matter of law appellant had probable cause to suspend appellee, appellee's cross points are overruled.

For the reasons stated, the judgment of the trial court that appellee have and record actual damages in the amount of $62,500.00 from appellant is reversed and judgment is hereby rendered that appellee take nothing from appellant.

Reversed and rendered.

OTIS T. DUNAGAN
Chief Justice

Opinion delivered July 21, 1977.

COURT OF CIVIL APPEALS
TWELFTH SUPREME JUDICIAL DISTRICT OF TEXAS
Tyler, Texas August 18, 1977

BARBARA A. HOLMAN, Clerk,

Received August 22, 1977, Law Offices of James G. Murry

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Mr. James M. Parker
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You are hereby notified that, in the case of CITY OF SAN ANTONIO, ACTING BY AND THROUGH TIS WATERWORKS BOARD OF TRUSTEES VS. RALPH WAYNE THEIS our No. 1007, from Bexar County, the following decision and order was this day made and entered by this Court:

Motion Docket No. 2348:

Appellee's Motion for Rehearing having been duly considered, it is ORDERED that said Motion be, and hereby is, overruled.

Respectfully yours,

Barbara A. Holman, Clerk

Court of Civil Appeals for the Twelfth
Supreme Judicial District of Texas

By_____, Deputy

1b

DUPLICATE NOTICE
CLERK'S OFFICE - SUPREME COURT
Austin, Texas
Feb. 8, 1978

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of THEIS V. SAN ANTONIO WATER WORKS BOARD,

NO. B - 7074,
was this day refused, No reversible error.

Very truly yours,
GARSON R. JACKSON, Clerk

CLERK'S OFFICE - SUPREME COURT

Austin Texas,
March 22, 1978

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of THEIS V. SAN ANTONIO WATER WORKS BOARD, No. B- 7074
was this day overruled.

Very truly yours,
GARSON R. JACKSON, Clerk

* * *

March 22, 1978

From Bexar County, Twelfth District

NO. B - 7074

RALPH WAYNE THEIS
V.
SAN ANTONIO WATER WORKS BOARD

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

NO. B - 7074

IN THE SUPREME COURT OF TEXAS

RALPH WAYNE THEIS,

PETITIONER

VS.

CITY OF SAN ANTONIO, ACTING BY AND THROUGH ITS WATER WORKS BOARD OF TRUSTEES OF SAN ANTONIO,

RESPONDENT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given to the Supreme Court of the State of Texas and to the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas, Sitting at Tyler, Texas, that Ralph Wayne Theis, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Texas, refusing, no reversible error, the application for writ of error of Appellant, the same being entered in this action on February 8, 1978, and the order overruling Appellant's motion for rehearing on application for writ of error by the Supreme Court of the State of Texas, entered herein on March 22, 1978.

This appeal is taken pursuant to 28 U.S.C., Section 1257 (2).

S/ EDWARD V. DYLLA
COUNSEL FOR APPELLANT
D-305 Petroleum Center
900 NE Loop 410
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A/C 512 - 828 8171

DATED: June 14, 1978

Supreme Court, U. S.
FILED
AUG 9 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1977

No. 78-74

RALPH WAYNE THEIS,

Appellant,

v.

CITY OF SAN ANTONIO, ACTING BY AND THROUGH ITS WATER WORKS BOARD OF TRUSTEES OF SAN ANTONIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

APPELLEE'S MOTION TO DISMISS THE APPEAL FROM THE STATE COURT, OR IN THE ALTERNATIVE TO AFFIRM THE RULING OF THE COURTS BELOW

JANE MACON
City Attorney
City of San Antonio
City Hall
San Antonio, Texas 78205

SAWTELLE, GOODE, DAVIDSON & TROILO, A PROFESSIONAL CORPORATION
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Attorneys for the City of San Antonio, Acting by and Through Its Water Works Board of Trustees of San Antonio

Bowne of Houston, Inc. Printed in U.S.A.

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1977

No. 78-74

RALPH WAYNE THEIS,

Appellant,

v.

CITY OF SAN ANTONIO, ACTING BY AND THROUGH ITS WATER WORKS BOARD OF TRUSTEES OF SAN ANTONIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

APPELLEE'S MOTION TO DISMISS THE APPEAL FROM THE STATE COURT, OR IN THE ALTERNATIVE TO AFFIRM THE RULING OF THE COURTS BELOW

The Appellee, City of San Antonio, Acting by and through its statutory agent, the Water Works Board of Trustees of San Antonio, moves the Court to dismiss the appeal hereon, or in the alternative to affirm the judgment of the Courts below on the following grounds:

1. The Federal question sought to be reviewed was not timely and properly raised by the Appellant and was not expressly passed on by the courts of Texas.

2. The appeal does not present a substantial Federal question.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

I. Whether this Court has jurisdiction to consider an appeal from the Texas Supreme Court, the state's highest court, under circumstances where the constitutional question stems from a decision of the Court of Civil Appeals of the 12th Supreme Judicial District of Texas, an intermediate level appellate court, the appeal from which by writ of error was refused by the Texas Supreme Court with the notation "no reversible error" and where Appellant had first raised a constitutional question on Motion for Rehearing before that tribunal, which Motion was overruled without opinion?

2. Whether the Judgment of the Court of Civil Appeals of the 12th Supreme Judicial District of Texas, pursuant to Rules 301 and 434 of the Texas Rules of Civil Procedure, overruling a denial by the trial court of a timely Motion for Judgment non obstante veredicto and rendering judgment, non obstante veredicto, is a denial of Plaintiff's right to due process?

COUNTER-STATEMENT OF THE CASE

Appellant's Statement of the Case is significantly inaccurate in a number of instances and appears to be a statement of what Appellant sees the facts to be as opposed to what the record reflects they are. For an accurate, objective and concise statement of the facts of this case, Appellee

refers this Court to the text of the Court of Civil Appeals Opinion which is attached to Appellant's Appendix (App., p. A.4-A.7)

I. REASON WHY THE APPEAL SHOULD BE DISMISSED

The Federal question sought to be reviewed was not timely and properly raised by the Appellant and was not expressly passed on by the courts of Texas.

Prior to the Texas Supreme Court's refusal to grant Appellant's Writ of Error with a notation "writ ref'd, no reversible error", and prior to his Motion for Rehearing to that Court, Appellant had not raised any Federal constitutional questions. Appellant on page 3 of his Jurisdictional Statement states correctly that he raised the constitutional question for the first time in his Motion for Rehearing after the Texas Supreme Court had refused his Application for Writ of Error. The stated reason of Appellant for not asserting the constitutional point earlier in the State appellate process was Appellant's surprise that the state's highest court would affirm the judgment of the lower appellate court and fail to reverse on a constitutional point which he had never claimed. Appellant is basing his appeal to this Court on the theory that he has a right to demand that the Texas Supreme Court be his advocate and proclaim on its own initiative that Appellant has been denied due process. Under such a theory neither this Appellant nor any other would ever have to assign any point of law as error before an inferior court.

The Supreme Court of the United States has previously ruled that in order to maintain the jurisdiction of the Court because of the denial in a state court of any right claimed under the Constitution of the United States, the record must reflect that such right was specifically set up or claimed at

the proper time and in the proper way. *Texas and Pacific Ry. Co.* v. *Southern Pacific Co.,* 137 U.S. 48 (1890). In the *Texas Pacific Ry. Co.* case, as in the present case, a violation of the constitutional right was not claimed until petition for rehearing after the judgment by the Louisiana Supreme Court. This Court in its opinion held that a violation of a constitutional right is not properly claimed when suggested for the first time in a petition for rehearing after judgment. *Id.* at 54.

Appellant's Application for Writ of Error to the Texas Supreme Court and Motion for Rehearing denied was refused without opinion. (App. A-23).

This Court in *Bowe* v. *Scott,* 233 U.S. 658 (1914), in examining a jurisdictional situation identical to the present case, held that a state court's actions in declining to grant a rehearing without reciting the reasons therefor did not constitute a decision of the Federal question. This Court ruled:

> "It is elementary that a mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no ground for invoking jurisdiction of the Court unless the court below in dealing with the petition for rehearing considers and passes upon the Federal ground therein relied upon . . ." *Id.* at 63.

This Court has consistently reaffirmed the above rule. *Bailey* v. *Anderson,* 326 U.S. 203 (1945); *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120, 128-129 (1945); *Hanson* v. *Denckla,* 357 U.S. 235, 243-244 (1958).

Further, this Court has held that where a state court has failed to pass upon a Federal question, this Court will assume the omission was due to the want of proper presentation in the state court, unless the party raising the question can affirmatively show to the contrary. *Street* v. *New York,* 394 U.S. 576, 582 (1969).

Such an assumption by this Court in the instant case would be appropriate.

The opinion at which Appellant directs his attack is that of the Texas Court of Civil Appeals for the Twelfth Supreme Judicial District. Appellant by his own admission on page 3 of his Jurisdictional Statements did not raise a Federal question in his Motion for Rehearing before that judicial body. Appellant was in no way precluded from raising a Federal question in his Motion for Rehearing Twelfth Court of Civil Appeals. Appellant's failure to raise the question, however, did preclude him from raising a Federal question as grounds for appeal to the Texas Supreme Court.

The Texas Rules of Civil Procedure, Rule 469(e) states that in an appeal from a Court of Civil Appeals decision by application for a writ of error to the Texas Supreme Court the matter complained of must be included as error in the motion for rehearing before the Court of Civil Appeals. That Rule states in part:

> "Whether the matter complained of originated in the trial court or in the Court of Civil Appeals, it must be assigned as error in the motion for rehearing filed in the latter court."

The above Rule is enforced as part of the orderly process of judicial review in the Texas state courts. *Watson* v. *Glen Falls Ins. Co.,* 505 S.W.2d 793 (Tex. 1974); *Lone Star Gas Co.* v. *Shearer,* 157 Tex. 508, 305 S.W. 2d 150 (Tex. 1957); *Texas State Highway Department* v. *Fillmon,* 150 Tex. 460, 242 S.W.2d 172 (Tex. 1951). Appellant seeks to avoid the effect of his failure to raise the question by invoking exceptions to the general rule. The exceptions are that a Constitutional question is not tardily raised on motion for rehearing before the highest state court under either of the following circumstances:

(1) The ruling of the highest state court supplies the basis of the Federal question and the ruling could not have been foreseen. *Herndon* v. *Georgia,* 295 U.S. 441 (1935).

(2) The state's procedural rules preclude raising the issue. *Saunders* v. *Shaw,* 244 U.S. 317 (1917); and *Great Northern R. Co.* v. *Sunburst Oil and Refining Co.,* 287 U.S. 358 (1932).

In the first instance the ruling of the state court which supplies the basis of the Federal question is that of the Court of Civil Appeals — not the state's highest court — and Appellant did not raise a Federal question for the Court of Civil Appeals to consider. Further, Rule 483 of the Texas Rules of Civil Procedure provides in part:

> "Order on Application for writ of error. In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with a docket notation 'Refused'. In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the court will deny the application with the notation 'Refused. No Reversible Error'. In all cases where the Supreme Court is without jurisdiction of the case as presented in the application, it will dismiss the application with the docket notation 'Dismissed for Want of Jurisdiction.' "

Under this Rule there was no mandatory duty on the part of the Texas Supreme Court to grant Appellant's Application of Writ of Error and reverse the decision of the Court of Civil Appeals.

Appellant not only failed to assign a Federal question as error in his Motion for Rehearing before the Court of Civil Appeals, but he failed as well to raise the question in his Application for Writ of Error to the Texas Supreme Court. Nor could he properly have done so. Even so, his failure to try until filing his Motion for Rehearing suggests at least that Appellant was overcome more by oversight than by surprise. It was a foreseeable consequence that the Texas Supreme Court might affirm, without opinion, the decision of the Court of Civil Appeals.

Appellant was legally obligated to anticipate that the Texas Supreme Court would not, of its own motion, rule that Appellant had been denied due process by reason of the decision of the Court of Civil Appeals. Texas Rule of Civil Procedure 434, Federal Statute 28 U.S.C. § 2106 and this Court's decision in *Neely, infra.,* are at least adequate to suggest to Appellant the possibility that the Texas Court would not volunteer in Appellant's behalf a now alleged, but then unsolicited and unclaimed, right of due process.

In the second instance Appellant could have readily preserved any Federal question by following the provisions of Rule 469(e), *supra.* Contra *Saunders, supra,* in the instant case there was no change in the complexion of the case in the Texas Supreme Court which would warrant invocation of the exception. There was no procedural circumstance which inhibited his timely raising the question.

For the foregoing reason, Appellee respectfully submits, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, that this Honorable Court dismiss the above entitled appeal.

II. THE APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

Appellant has not challenged the constitutionality of Rule 301, Texas Rules of Civil Procedure. He challenges the constitutionality of its application to the present case. Appellant's main constitutional challenge is based upon his contention that the Court of Civil Appeals went beyond its power in reversing the trial court's judgment and rendering judgment non obstante veredicto for Appellee.

The question of whether an appellate court may constitutionally reverse the trial court and render judgment non obstante veredicto under the Federal Rules of Civil Procedure has been directly answered by this Court.

In *Neely* v. *Eby Construction Co.*, 386 U.S. 317 (1967) this Court held:

> "The question is here whether the Court of Appeals, after reversing the denial of defendant's rule 50(b) motion for judgment notwithstanding the verdict, may itself order dismissal or direct entry of judgment for defendant. As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment notwithstanding the verdict than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment n.o.v."

Appellant complains that the Texas Court of Civil Appeals rendered verdict on its own "finding of fact". This is not the case. There was no question of fact when Appellant Theis admitted under oath that he had committed the very acts for which he had been suspended and later dismissed. Appellant further contends that the Texas Court of Civil Appeals had no authority to set aside the verdict of the jury and substitute its own decision and render judgment that the Plaintiff take nothing under Rule 301 of the Texas Rules of Civil Procedure.

Appellant has overlooked other authority to do just that.

Rule 434 of the Texas Rules of Civil Procedure in exact analogy to the Federal statute, 28 U.S.C. § 2106, states in part as follows:

> "When the judgment or decree of the court below shall be reversed, the court shall proceed to render such judgment or decree as the court below should have rendered except when it is necessary that some matter of fact be ascertained or the damage to be assessed or the matter to be decreed is uncertain, in either of the cases the cause shall be remanded for a new trial . . ."

Appellant's present appeal appears considerably more germane to Rule 434 of the Texas Rules of Civil Procedure since Rule 301 is in Section 11 of the Texas Rules of Civil Procedure which has to do with trial of causes in district and county courts. Rule 434 applies specifically to the Court of Civil Appeals.

Rule 434 of the Texas Rules of Civil Procedures compares closely with its Federal counterpart, 28 U.S.C. § 2106, the constitutionality of which was upheld by this Court in *Neely, supra.*, at 332. The Federal Statute, 28 U.S.C. § 2106 states, in part, as follows:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may . . . direct the entry of such appropriate judgment, decree or order . . . as may be just under the circumstances."

There is no apparent differentiation to be made in the parallel authority under the state rule and federal statute. Application of Rules 301 and 434, *supra.*, to the facts of this case no more violate any provision of the Constitution of the United States than the action of the Court of

Appeals in *Neely, supra.* The Court of Civil Appeals construction of the Texas Rules of Civil Procedure giving it authority to render a decision ordering judgment non obstante veredicto was not a new construction which threatened constitutional rights. The same construction has been properly made by this Court and by the Texas Courts with respect to similar rules of procedure.

For the foregoing reasons we respectfully submit that there is no substantial question raised in this appeal.

CONCLUSION

For all the foregoing reasons we respectfully submit that Appellant's appeal be dismissed, or in the alternative that the judgment of the courts below be affirmed. We further submit that, should this appeal be regarded as a petition for writ of certiorari, that certiorari be denied.

Respectfully submitted,

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Dated: August 8, 1978

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of Appellee's Motion To Dismiss The Appeal From the State Court, or in the Alternative To Affirm The Ruling of the Courts Below was mailed by Certified Mail, Return Receipt Requested, to Mr. Edward V. Dylla, Attorney at Law, D-305 Petroleum Center, 900 N. E. Loop 410, San Antonio, Texas 78209, and Mr. James G. Murry, Attorney at Law, D-305 Petroleum Center, 900 N. E. Loop 410, San Antonio, Texas 78209, Attorneys for Appellant, this 8th day of August, 1978.

Richard A. Flores